

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2010 OCT 10 PM 12:55 ✓

IN AND FOR THE COUNTY OF YAVAPAI

BY Kelly Gresham

THE STATE OF ARIZONA,

Plaintiff,

vs.

No. P1300CR2008-1339

STEVEN CARROLL DEMOCKER,

Defendant.

BEFORE: THE HONORABLE WARREN R. DARROW
JUDGE PRO TEMPORE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
TUESDAY, SEPTEMBER 14, 2010
9:20 A.M. - 11:51 A.M.

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

TESTIMONY OF GARETH RICHARDS AND DAVID MARK DAY

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

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APPEARANCES

On Behalf of the State:

Mr. Joseph Butner and Mr. Jeffrey Paupore
Yavapai County Attorney's Office

On Behalf of the Defendant:

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Prescott, AZ 86302

Mr. Larry Hammond and Ms. Anne Chapman
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Phoenix, AZ 85012

1 (Whereupon, the jury enters the courtroom.)

2 THE COURT: We are the record in State of
3 Arizona versus Steven Carroll DeMocker. Mr. DeMocker is
4 present, represented by Mr. Sears and Ms. Chapman, who are
5 present. And the State's present through Mr. Butner and
6 Mr. Paupore this morning. And the jury is present as well.

7 Mr. Butner.

8 MR. BUTNER: Judge, the State would call
9 Gareth Richards to the stand, please.

10 THE COURT: Okay. Sir, if would you please
11 stand where the bailiff directs you. Raise your right hand
12 and be sworn by the clerk.

13 THE CLERK: You do solemnly swear or affirm
14 under the penalty of perjury that the testimony you are about
15 to give will be the truth, the whole truth, and nothing but
16 the truth, so help you God?

17 THE WITNESS: I do.

18 THE COURT: Please be seated there at the
19 witness stand, please.

20 Sir, would you begin by stating and spell
21 your full name.

22 THE WITNESS: Gareth Richards, G-A-R-E-T-H.
23 Last name is R-I-C-H-A-R-D-S.

24 THE COURT: Thank you.

25 Mr. Butner.

1 GARETH RICHARDS,
2 called as a witness, having been duly sworn, testified as
3 follows:

4 DIRECT EXAMINATION

5 BY MR. BUTNER:

6 Q. Good morning, Mr. Richards.

7 A. Good morning.

8 Q. Where do you presently reside?

9 A. Boulder, Colorado.

10 Q. And how long have you lived in Boulder, Colorado?

11 A. Eleven years.

12 Q. And do you operate a business in Boulder,
13 Colorado?

14 A. I do.

15 Q. What is the name of that business?

16 A. It is called Outdoor ProLink.

17 Q. And let's back up for just a second.

18 Before moving to Boulder, Colorado, did
19 you ever live in Prescott, Arizona.

20 A. I did.

21 Q. When was that?

22 A. 1991 to 1999.

23 Q. And during that time frame, did you ever become
24 acquainted with a person named Steven DeMocker?

25 A. Yes.

1 Q. How was it that you met Steven DeMocker?

2 A. I worked at Prescott College, and Steve and I
3 became acquainted when he was the Dean. So when I was
4 interviewed to become a faculty member at Prescott College,
5 he was part of the process, and then subsequent to that --

6 THE COURT: Mr. Butner, I am going to ask
7 Mr. Richards to pull the microphone closer. Some jurors were
8 indicating.

9 With that overhead up, can everybody see
10 all right? Thank you. Let's try that.

11 BY MR. BUTNER:

12 Q. You became acquainted with Steven DeMocker when
13 you became part of the faculty at Prescott College?

14 A. Correct.

15 Q. What did you teach at Prescott College?

16 A. I taught adventure education.

17 Q. When was that?

18 A. August 1991 to approximately June 1999.

19 Q. Were you also acquainted with Virginia Carol
20 Kennedy?

21 A. Yes.

22 Q. How was it that you knew Virginia Carol Kennedy?

23 A. She was also a faculty member in the resident
24 degree program, which is undergraduate program at Prescott
25 College.

1 Q. Did you teach any undergraduate degree program
2 there?

3 A. Yes.

4 Q. You moved to Boulder, Colorado, at least
5 ultimately?

6 A. Correct.

7 Q. And started the Outdoor ProLink business?

8 A. Correct.

9 Q. When did you start Outdoor ProLink?

10 A. Initially we started in 1999 for a couple of few
11 years, and then we mothballed it and then restarted it in the
12 Fall of 1995.

13 Q. In the Fall of what?

14 A. 1995 -- excuse me. 2005.

15 Q. You really had me confused there for a second. So
16 you fired it back up in 2005?

17 A. Yes.

18 Q. Would you describe what kind of business Outdoor
19 ProLink is.

20 A. It is an on-line program, e-commerce program that
21 sells outdoor equipment, all manner of outdoor equipment;
22 tents, sleeping bags, stoves, sunglasses, skis to outdoor
23 professionals, in other words, people that work in the
24 outdoor industry.

25 Q. And does it sell shoes?

1 A. Yes.

2 Q. And how does one get to do business with Outdoor
3 ProLink as a customer?

4 A. As a customer, the site is a password protected
5 site, and people who want to do business with us will fill
6 out an application. They get approved, and then they get
7 access to the site. And there are some significant discounts
8 on the site.

9 Q. And these are discounts for people in what kind of
10 professions?

11 A. Anything from a mountain guide to a ski patroller
12 to a back country climbing ranger to an adventure travel
13 guide.

14 Q. So it is discounts for professionals in the
15 outdoor business, so to speak?

16 A. Yes.

17 Q. By the way, you have an interesting accent. Where
18 are you originally from, sir?

19 A. I am from Wales.

20 Q. Is that the same place Richard Burton was from?

21 A. Absolutely.

22 Q. All right. Going back to the business at hand.

23 So you are acquainted with Mr. DeMocker.
24 Had you provided him with a password for your business?

25 A. Yes, I did.

1 Q. And drawing your attention back to the time frame
2 of April of the year 2006, do you recall doing business with
3 Mr. DeMocker during that time frame?

4 A. Yes.

5 Q. Would you tell us what kind of business you did
6 with Mr. DeMocker back in April of 2006?

7 A. He placed an order for a number of items from the
8 site, and some sunglasses, some shoes, and I think there was
9 one other thing on that order.

10 Q. And how was this order placed? Could you describe
11 it for us, please.

12 A. Sure. It is an e-commerce site, so people would
13 place an item, choose an item, choose the size, the color,
14 place the item in the shopping cart, similarly to any
15 e-commerce site that's available these days, and purchase it
16 using a credit card.

17 MR. BUTNER: And I am going to show you what
18 has been marked as Exhibit No. 689 for identification.

19 May I approach, Judge?

20 THE COURT: Yes.

21 MR. BUTNER: Thank you, sir.

22 Q. Do you recognize Exhibit 689?

23 A. Yes.

24 Q. What is it, please?

25 A. It's an order that was placed on the 22nd of

1 April, 2006, by Steven DeMocker for a number of items on the
2 Outdoor ProLink website.

3 Q. Did you have direct conversation with Mr. DeMocker
4 at the time of that order?

5 A. I don't think so. Maybe.

6 Q. Pardon?

7 A. I don't recall.

8 Q. Is there anything about that particular order that
9 indicates that you did have conversation with him?

10 A. He and I had conversed, you know, during this
11 time, but I don't recall talking specifically about this
12 order.

13 Q. Okay. But it is an e-commerce transaction?

14 A. Yes. It is completely electronic.

15 Q. He e-mailed his order to you?

16 A. He places the order on-line, enters his credit
17 card, his personal information, shipping information, presses
18 "submit," and it shoots across the World Wide Web, and we
19 receive it.

20 Q. Looking at Exhibit No. 689, is that the
21 documentary evidence, so to speak, of the transaction that
22 Outdoor ProLink had with Mr. DeMocker on April 22nd of the
23 year 2006 with Outdoor ProLink?

24 A. Yes.

25 Q. And are you the custodian of those records in the

1 ordinary course of the business?

2 A. I am.

3 MR. BUTNER: I would move for the admission of
4 Exhibit 689 at this time.

5 MS. CHAPMAN: Your Honor, I have no objection
6 to the admission of the first page. The second page appears
7 to be related to something else. I am not sure if Mr. Butner
8 intends to introduce both pages, but that would be the
9 objection.

10 THE COURT: Mr. Butner, would you check the
11 second page.

12 MR. BUTNER: I've looked at the second page.
13 It was just part of the records provided. Maybe I could ask
14 the witness some questions about that.

15 THE COURT: Okay.

16 BY MR. BUTNER:

17 Q. There is two sheets before you; is that correct,
18 Mr. Richards?

19 A. Yes.

20 Q. What is the second sheet?

21 A. The second sheet is a subsequent order placed on
22 the 11th of May, 2007, for a pair of sunglasses.

23 Q. So this is actually evidence of two separate
24 transactions?

25 A. Correct.

1 MR. BUTNER: I am only seeking to offer the
2 evidence of the transaction of April 22nd of the year 2006,
3 Judge. I don't know how to fix that exhibit.

4 THE COURT: Can I see the exhibit, Mr. Butner?

5 MR. BUTNER: Certainly.

6 THE COURT: I will ask Mr. Richards to hand it
7 to me, please. Thank you, sir.

8 Counsel, if there is no objection, I will
9 admit just the first page, and it will be numbered 689. Any
10 objection to that?

11 MR. BUTNER: No objection, Judge.

12 MS. CHAPMAN: No objection.

13 THE COURT: Thank you.

14 MR. BUTNER: May I remove the first page from
15 this. The only thing is the exhibit sticker is on the back
16 of the second page.

17 THE COURT: Correct. I want to make sure it
18 gets marked.

19 MR. BUTNER: She can fix that? Okay.

20 Actually, I am going to put this on the
21 overhead, okay?

22 THE COURT: All right.

23 BY MR. BUTNER:

24 Q. Can you see that, Mr. Richards?

25 A. I can, yes.

1 Q. Can you read it?

2 A. Yes.

3 Q. I tried to focus in as well as I could.

4 This is the document admitted that
5 evidences the transaction. There is a laser pointer right in
6 front of you there, that black thing. If you turn it around
7 and move that little button, I think you get the laser stuff
8 to come out.

9 Would you point to the entry on the order
10 that indicates when the order was placed.

11 A. It is placed exactly -- there is a time stamp
12 right here. 4/22/07, I think that is.

13 Q. It is actually 4/22/06. Does it show the time?

14 A. The time is right there. 4:23 p.m.

15 Q. Actually, I think it is 4:33 p.m. If you need to
16 step down to see that better, you may do so.

17 THE COURT: Please watch your step there.

18 MR. BUTNER: Yeah, be careful.

19 Q. And then down below that it indicates the user
20 e-mail that was used; right?

21 A. Yes. Right there.

22 Q. Can you read that?

23 A. That is a little tough.

24 Q. You can look at this.

25 A. Sdem@cableone.net.

1 Q. And that's presumably from Mr. DeMocker; right?

2 A. Correct.

3 Q. And it has the total amount of the order; right,
4 in this particular area?

5 A. Right.

6 Q. And down below it indicates "billing info;" right?

7 A. Correct.

8 Q. Who was it billed to?

9 A. Steven DeMocker.

10 Q. What address is that at?

11 A. 1714 Alpine Meadows Lane, No. 1405, Prescott,
12 Arizona.

13 Q. Actually, 1716 Alpine Meadows Lane; right?

14 A. Yes.

15 Q. That is where it was billed. Where was it
16 shipped?

17 A. Shipped to UBS, 1550 Plaza West Drive, Prescott,
18 Arizona.

19 Q. 1560 Plaza West?

20 A. Yes, sorry.

21 Q. And then there is a description of the various
22 items that were shipped; right?

23 A. Right. Down here.

24 Q. You indicated that there were some shoes that were
25 ordered and shipped; right?

1 A. Correct.

2 Q. What kind of shoes were ordered and shipped?

3 A. Two were kinds of shoes shipped. In this column
4 here is the brand name. The first pair is La Sportiva.
5 That's the brand. And then the type is a Raja.

6 Q. What kind of a shoe is that?

7 A. That's a trail running shoe. Color and the size,
8 and then the price is over here. This is confirmation
9 required, which is an internal operation.

10 Q. Basically, this is a real good deal on the price?

11 A. It's a very good deal.

12 Q. Kind of like a wholesale?

13 A. It is like 40- to 35-percent off retail.

14 Q. And the next pair of shoes that was ordered?

15 A. The next one is La Sportiva again, which is the
16 brand. The style of shoe is Pike's Peak, and the style
17 number, and then the size and then the price.

18 Q. And both of those were ordered at the same time;
19 right?

20 A. Yes, this is one order.

21 Q. Now, before this case I never heard of La
22 Sportiva. Is there something special about that company, to
23 your knowledge?

24 A. La Sportiva is probably the best mountaineering,
25 backpacking shoe company in the world.

1 Q. And where is La Sportiva located, to your
2 knowledge?

3 A. In the United States. The distribution center is
4 Boulder, Colorado.

5 Q. In fact, Outdoor ProLink -- does Outdoor ProLink
6 do a lot of business with La Sportiva?

7 A. We do a significant amount of business with La
8 Sportiva.

9 Q. Do you have a particular agent or person that you
10 work through there?

11 A. Yes. The relationship that I set up -- I develop
12 relationships with a number of brands, approximately 50 right
13 now, one of them being La Sportiva, and I generally deal with
14 the V.P. of sales, or the president. In this case it is Mark
15 Day, who is the V.P. of sales and marketing at La Sportiva.

16 Q. He is a Boulder guy also?

17 A. He is a Boulder guy also.

18 Q. Those shoes, did you receive some sort of
19 confirmation on shipping of those shoes?

20 A. We receive -- once the order is processed, we
21 receive a confirmation e-mail saying they received the order
22 and they will ship it.

23 MR. BUTNER: Would you please resume the
24 stand.

25 Let me show you what has been marked as

1 Exhibit 3238.

2 May I approach again, Judge?

3 THE COURT: Yes.

4 BY MR. BUTNER:

5 Q. Let me show you again what has been marked as
6 Exhibit No. 3238. Taking a look at that, Mr. Richards, do
7 you recognize that, sir?

8 A. Yes, I do.

9 Q. What is it?

10 A. It's a confirmation of the order from La Sportiva
11 being shipped to Steven DeMocker.

12 Q. Is that something that is sent by La Sportiva to
13 Outdoor ProLink to confirm the shipping?

14 A. Correct.

15 Q. And you received that at Outdoor ProLink?

16 A. Yes.

17 MR. BUTNER: I would move for the admission of
18 Exhibit 3238 at this time.

19 MS. CHAPMAN: Your Honor, there appears to be
20 some handwriting that is not from the exhibit on the back,
21 and I spoke to Mr. Butner about removing that, and as long as
22 that is removed, I have no objection to the exhibit.

23 MR. BUTNER: We will do that, Judge. We will
24 get that removed.

25 THE COURT: That is on the back?

1 MR. BUTNER: It is on the back.

2 THE COURT: Exhibit 3238 is admitted, just the
3 face page.

4 MR. BUTNER: And I am going to put that up on
5 the overhead also. Actually, back this up a little bit.

6 Q. There is a little notation down at the bottom. I
7 don't know if you can read it from there, though.

8 A. The handwritten?

9 Q. No, not that, but this right down here?

10 A. That is a date stamp. I think it is 4/23/2006.
11 4/25/2006.

12 Q. That's the confirmation that was sent to you on
13 4/25/2006?

14 A. Yes.

15 Q. For the shipping to Mr. DeMocker?

16 A. Yes.

17 MR. BUTNER: No further questions of this
18 witness at this time. Thank you, Mr. Richards.

19 THE COURT: Thank you.

20 Miss Chapman.

21 CROSS-EXAMINATION

22 BY MS. CHAPMAN:

23 Q. Good morning, Mr. Richards.

24 A. Good morning.

25 Q. The site Outdoor ProLink, I think you said, offers

1 a discount to its members; is that right?

2 A. Correct.

3 Q. And Mr. DeMocker was a member, in part, based on
4 your being an acquaintance of his from Prescott College days?

5 A. Correct.

6 Q. I think you said, but I wanted to make sure, that
7 the discount was approximately 35- to 40-percent. Is that
8 right?

9 A. It is approximately. Depending on the brand, it
10 is anywhere from 30- to 50-percent off retail.

11 Q. Is that for everything on the site?

12 A. Yes.

13 Q. Okay. And that is a discount from the regular
14 retail price then, that 35- to 50-percent?

15 A. Yes.

16 Q. I think when you were looking at the Exhibit 689,
17 the price for those shoes was somewhere in the range of \$47
18 for one pair and \$52 for the other pair. That is a
19 significant discount from what you would pay if you went to a
20 retail store to purchase those shoes; is that correct?

21 A. Correct.

22 Q. You also testified that those shoes were shipped
23 by your company to Mark Day's company sometime in April of
24 2006; is that right?

25 A. Not quite.

1 Q. Okay. Did you ship it directly to Mr. DeMocker?

2 A. The site takes the order. We automatically
3 transfer the order electronically to the manufacturer, in
4 this case La Sportiva, and they drop ship the order to the
5 customer.

6 Q. So, Outdoor ProLink didn't ship the order. La
7 Sportiva shipped the order. Is that correct?

8 A. Correct.

9 Q. You don't have any idea what happened to the order
10 after it was shipped or after the information was sent to La
11 Sportiva; is that right?

12 A. No, no.

13 Q. I think that you had said, and it was indicated on
14 this 689, that Mr. DeMocker bought other items at the same
15 time; is that right?

16 A. Correct.

17 Q. And do you know whether Mr. DeMocker ever returned
18 any of these items?

19 A. I don't.

20 Q. Do you know whether he ever returned any items at
21 all from when he purchased them on your site?

22 A. I don't.

23 Q. And he did make other purchases from Outdoor
24 ProLink over the years; is that right?

25 A. Yes.

1 Q. I think you had testified about one of them
2 happening approximately a year later in May of 2007; is that
3 right?

4 A. Yes.

5 Q. So he continued to use the site from time to time?

6 A. Yes.

7 Q. I know that you said that with respect to one of
8 the shoes, did you say Raja?

9 A. Yes.

10 Q. That is a running shoe, a trail running shoe?

11 A. Yes.

12 Q. How about the other shoe, the Pike's Peak shoe.
13 What kind of shoe is that?

14 A. It is sort of a mixture between a low backpacking
15 shoe, which would be under the ankle, and a running shoe. So
16 it is not truly a running shoe, and it is not a backpacking
17 shoe. It is what is termed an approach shoe.

18 Q. An approach shoe.

19 Are either of those shoes, the Pike's
20 Peak or the Raja, designed for use with the clipless mountain
21 bike pedals?

22 A. They are not.

23 MS. CHAPMAN: Thank you.

24 No further questions.

25 THE COURT: Thank you.

1 Mr. Butner.

2 REDIRECT EXAMINATION

3 BY MR. BUTNER:

4 Q. Back up for just a moment to the order.

5 Okay. On this order, it indicates
6 confirmation required. What does that mean?

7 A. That means that we -- this is an internal document
8 from us, which is sent to each brand. In this case there are
9 four brands. SteriPEN, Optic Nerve, Optic Nerve, Julbo, La
10 Sportiva, La Sportiva.

11 When we receive this order, it
12 automatically disbursed to four different companies, in this
13 case, and they need to confirm each order with us
14 electronically.

15 Q. Then I showed you that follow-up e-mail back from
16 La Sportiva; right?

17 A. Correct.

18 Q. That was the confirmation from them concerning the
19 two La Sportiva shoes, the Rajas and the Pike's Peak; right?

20 A. Correct.

21 Q. Basically what was it confirming?

22 A. Confirming that they had received the order, and
23 it was in place to be shipped.

24 Q. And they were shipping to Mr. DeMocker?

25 A. Correct.

1 Q. And then -- and it shows where it was shipped on
2 that confirmation, too; right, the shipping information?

3 A. Correct.

4 Q. And did you ever hear any complaints from
5 Mr. DeMocker about this order?

6 A. No.

7 Q. Any problems with these shoes that he mentioned to
8 you?

9 A. No.

10 Q. And what did you call this kind of shoe?

11 A. An approach shoe.

12 Q. An approach shoe. What does that mean?

13 A. In climbing and mountaineering terms, which is
14 what La Sportiva is known for, rock climbing and
15 mountaineering, an approach shoe is something you would wear
16 as you approach a climb. So it has got sticky rubber.

17 Q. Sticky rubber so it sticks to whatever is beneath
18 the sole?

19 A. Correct.

20 Q. So you could actually use this shoe to ride a
21 bicycle that had the clip-type pedals without wearing the
22 clip shoes?

23 A. Could be.

24 Q. Is there a special kind of name for this sticky
25 sole?

1 A. There is a number of different types of rubber
2 that is used in the industry.

3 Q. La Sportiva has a special name for their's; do you
4 remember?

5 A. Well, Vibram is one of them, and then there is a
6 number of different types of sticky rubber.

7 Q. And La Sportiva has its own special kind of sticky
8 rubber; right? They don't use Vibram?

9 A. No, it's their own rubber that is used on some of
10 these climbing shoes or approach shoes.

11 Q. That is kind of what makes them so special; right?

12 A. And the design.

13 MR. BUTNER: No further questions of this
14 witness.

15 Thank you, sir.

16 THE COURT: Thank you.

17 Are there any questions from the jury? I
18 have a question.

19 Sir, if you would please stay seated for
20 a minute while I get jury questions and talk to the
21 attorneys.

22 Any more questions? If I could see the
23 lawyers at side bar and try it not on the record for now.

24 (Whereupon, a discussion was held off the record.)
25

1 QUESTIONS BY THE JURY

2 THE COURT: Mr. Richards, you have two
3 questions. The lawyers may want to follow-up.

4 First question is: How many shoes in
5 total were ordered?

6 THE WITNESS: Two pairs.

7 THE COURT: Would you have been notified if a
8 return was made?

9 THE WITNESS: Yes.

10 THE COURT: Follow-up, Mr. Butner?

11 FOLLOW-UP QUESTIONS

12 BY MR. BUTNER:

13 Q. Did you receive any notification that a return was
14 made?

15 A. No.

16 MR. BUTNER: No further questions.

17 THE COURT: Ms. Chapman.

18 FOLLOW-UP QUESTIONS

19 BY MS. CHAPMAN:

20 Q. And it was your testimony that as far as you know,
21 Mr. DeMocker never made any returns to your company from his
22 purchases; is that correct?

23 A. Correct.

24 THE COURT: Counsel, may Mr. Richards be
25 excused as a witness?

1 MR. BUTNER: He may, Judge.

2 MS. CHAPMAN: He may.

3 THE COURT: Mr. Richards, you will be excused
4 as a witness at this time. However, the rule of exclusion of
5 witnesses applies in this case. This means that you cannot
6 communicate in any way with other witnesses about your
7 testimony or about any other aspect of this case until all
8 witnesses have testified. It is best that you not discuss
9 this case with anyone until the trial is completed.

10 However, you may talk to the attorneys
11 about the case, as long as no other witnesses are present.

12 Do you understand?

13 THE WITNESS: I do.

14 THE COURT: Thank you, sir. Again, please
15 watch your step. You are excused.

16 Mr. Butner.

17 MR. BUTNER: Thanks, Judge.

18 I would like to call Mark Day to the
19 stand.

20 THE COURT: Sir, if you would please stand
21 where the bailiff directs you. Right there is fine. Raise
22 your right hand and be sworn by the clerk.

23 THE CLERK: You do solemnly swear or affirm
24 under the penalty of perjury that the testimony you are about
25 to give will be the truth, the whole truth, and nothing but

1 the truth, so help you God?

2 THE WITNESS: I do.

3 THE COURT: Please be seated here at the
4 witness stand.

5 Would you please begin by stating and
6 spelling your full name.

7 THE WITNESS: David Mark Day. D-A-V-I-D,
8 M-A-R-K, D-A-Y.

9 THE COURT: Thank you.

10 Mr. Butner.

11 MR. BUTNER: Thank you.

12 DAVID MARK DAY,
13 called as a witness, having been duly sworn, testified as
14 follows:

15 DIRECT EXAMINATION

16 BY MR. BUTNER:

17 Q. Good morning, Mr. Day. How are you?

18 A. Another day in paradise.

19 Q. Good. What is your occupation, sir?

20 A. I am vice president of sales and marketing for La
21 Sportiva North America.

22 Q. How long have you been vice president of sales and
23 marketing for La Sportiva North America?

24 A. 15 years.

25 Q. Where do you reside?

1 A. Colorado.

2 Q. Approximately where?

3 A. Boulder, Colorado.

4 Q. I say approximately, because you told me basically
5 that you don't actually live in Boulder, Colorado, proper; is
6 that right?

7 A. Our offices and warehouses are located in Boulder.
8 I live in the mountains in the country west of there.

9 Q. Had a bunch of fires in that area. Is your home
10 safe?

11 A. About 15 miles to the north of us, but we were
12 just outside the evacuation area.

13 Q. Good luck with that.

14 So you have been with La Sportiva for 15
15 years. Were you working for La Sportiva back in April of the
16 year 2006?

17 A. Yes.

18 Q. And in what capacity at that time?

19 A. The same capacity, vice president of sales and
20 marketing.

21 Q. Are you familiar with Gareth Richards?

22 A. Yes.

23 Q. How is it that you know Mr. Richards?

24 A. He's a personal friend of mine, and I am
25 responsible for him having the contract to facilitate our pro

1 purchases.

2 Q. So you are friends with Mr. Richards, but you also
3 have a business relationship with him?

4 A. Yes. The friendship proceeded the business
5 relationship. When he established Outdoor ProLink, I was an
6 advocate for him to have the contract with La Sportiva.

7 Q. What type of a contract does he have with La
8 Sportiva?

9 A. He is the middle man, the facilitator for all pro
10 purchases for our brand. He operates a website that offers
11 password protected access to outdoor equipment at special
12 pricing for outdoor professionals.

13 Q. You say "password protected." Would you explain
14 to us how that works, basically?

15 A. He prequalifies the candidates based on each
16 individual brand's criteria. Once the prospective candidate
17 is qualified, he then provides that candidate access via his
18 website to make those purchases at special promotional
19 pricing, and they use a unique password to access that
20 pricing.

21 Q. He is between the customer and La Sportiva?

22 A. Absolutely.

23 Q. And did you have this kind of relationship with
24 Mr. Richards and Outdoor ProLink back in April of the year
25 2006?

1 A. Yes.

2 Q. In fact, drawing your attention back to that
3 particular time, let me show you what's been marked as
4 Exhibit No. 3239.

5 MR. BUTNER: And before we go any further with
6 this, Judge, I have shown these exhibits already to counsel,
7 but there is some writing on the back that we are going to
8 have to clear up on these exhibits, and we will do that after
9 we go through the testimony with the witness.

10 THE COURT: Okay.

11 BY MR. BUTNER:

12 Q. Showing you what has been marked as Exhibit 3239,
13 do you recognize this particular document, sir?

14 A. Yes. It is a pick ticket. The first document
15 that is generated in our facility off of an order. The
16 customer service personnel take the order, whether we
17 received electronically, fax, call-in order, enters the
18 pertinent information, generates this pick ticket. This pick
19 ticket then goes to the warehouse for the warehouse to have
20 to pick and pack the order.

21 Q. Is that a document that is kept by La Sportiva in
22 the ordinary course of business?

23 A. Yes.

24 Q. In fact, are you a custodian of that particular
25 document?

1 A. Yes.

2 Q. When you say a "pick ticket," would you clarify
3 that for us, please. What does that mean?

4 A. It is the document that the warehouse personnel
5 use to pick and pack the order.

6 Q. I see. And how is that particular document
7 generated?

8 A. The entry -- the data entry is done by one of my
9 customer service personnel. It is then printed at the
10 central printer in the customer service department. It is
11 then put in the warehouse basket, and quarterly, every 15 or
12 so minutes, one of the warehouse people comes in, pulls the
13 tickets, distributes amongst the other warehouse people.
14 They pick the orders, pack it and prepare it to be shipped.

15 Q. This is kind of Step 1 in the process of an order
16 with La Sportiva?

17 A. Technically it would be Step 2. Step 1 would be
18 receiving the order.

19 MR. BUTNER: I would move for the admission of
20 Exhibit 3239 at this time.

21 MS. CHAPMAN: No objection with the
22 understanding stated earlier.

23 MR. BUTNER: Thank you.

24 THE COURT: 3239 is admitted with the
25 extraneous parts removed before it would go to the jury.

1 BY MR. BUTNER:

2 Q. Okay. So let's put 3239 up on the board or on the
3 overhead.

4 Okay. If you would take a look over your
5 shoulder, Mr. Day. Can you see that?

6 A. Yes.

7 Q. Who is the order received from?

8 A. I'm sorry? Who is the order received from?

9 Q. That's correct.

10 A. In this case it would have been received via an
11 e-mail from Outdoor ProLink.

12 Q. And you don't have that before you at this time;
13 right?

14 A. I do not.

15 Q. But this ticket, it is called a picking sheet or
16 pick ticket as you put it; right?

17 A. Correct, yes.

18 Q. Indicates that the order came in on what date?

19 A. 4/25/06.

20 Q. Or thereabouts; right?

21 A. Or thereabouts.

22 Q. And it was sold to Outdoor ProLink; right?

23 A. Correct.

24 Q. It is Pro Outdoor ProLink. Is that a different
25 name?

1 A. Pro is an internal categorization for accounting
2 purposes of what account it is to be debited to, so all pro
3 accounts fall under that category. Then there are wholesale
4 accounts and there are retail accounts. Those are the three
5 categories that we use.

6 Another example of a pro account that
7 Outdoor ProLink does not facilitate would be an employee
8 purchase from a retailer, which is a different discount
9 structure, but it would still fall under the category of a
10 pro account.

11 Q. A pro account is between wholesale and retail?

12 A. Correct.

13 Q. And it reflects a discount of some type?

14 A. Discount structure, yes.

15 Q. Discount from what pricing structure?

16 A. In this case a discount off of retail.

17 Q. Approximately what would the discount have been in
18 this particular case in April 25th of '06?

19 A. It would range anywhere from, depending on the
20 product, anywhere from 20- to 35-percent.

21 Q. In this particular case, it says the ship date of
22 April 25th, 2006, and then it was going to be shipped to
23 whom?

24 A. Steve DeMocker at 1563 Plaza West Drive, Prescott,
25 Arizona.

1 Q. Right there, is that it?

2 A. That's correct.

3 Q. I am pointing to it for the record; right?

4 A. Yes.

5 Q. And for the record let me clarify, we have been
6 referring to Exhibit No. 3239. Do you remember that?

7 A. Yes.

8 Q. Okay. Good.

9 Now this indicates that two types of
10 items were sold; is that correct?

11 A. That's correct.

12 Q. What is the first one?

13 A. Raja.

14 Q. What is Raja?

15 A. Raja is a hiking, running shoe, a trail running
16 shoe.

17 Q. And the second item is called?

18 A. Pike's Peak.

19 Q. What is that?

20 A. Same category of product, a hiking, mountain
21 running shoe.

22 Q. All right. Let me show you what's been marked for
23 identification, and this would be for demonstrative purposes,
24 as Exhibit No. 3263.

25 Do you recognize what 3263 is?

1 A. Uh-huh. It is a right shoe, size roughly
2 43-and-a-half of a men's Pike's Peak.

3 Q. And is that the type of shoe that was shipped
4 pursuant to this picking sheet?

5 A. Yes. The second item on the pick sheet.

6 Q. In fact, is that the same size?

7 A. It's difficult for me to say, because this is a
8 salesmen's sample that is not marked as a size. This was
9 originally created for a salesman to use as an example sample
10 in a store, and it was the only sample that we had left of
11 this product that I provided to you. It is either a
12 43-and-a-half and a 43, depending upon the tooling that they
13 had when they built the samples. But sales samples are
14 standardized in a women's size 8 and a men's size 9 or
15 9-and-a-half. It is either a 42-and-a-half or a 43, most
16 likely.

17 Q. In fact, do you recognize that shoe as having been
18 provided to the State in this particular case?

19 A. Yes.

20 Q. And that shoe, is there something special about
21 the sole on that type of shoe?

22 A. Yeah. It is a proprietary allowed sole, which was
23 designed by La Sportiva. It is branded with our own sticky
24 rubber compound, Frixion rubber. Its designation on the
25 bottom package is Ultra Trail bottom package. It is a single

1 durometer memalex, which is rubberized EVA midsole. It is a
2 proprietorial outsole that is exclusive to La Sportiva.

3 Q. What does proprietorial outsole mean, Mr. Day, in
4 layman's terms for us that are not in the biz?

5 A. It is ours and only ours.

6 Q. It belongs to La Sportiva.

7 A. It belongs to La Sportiva.

8 Q. Okay. Go on please, rather slowly, though.

9 A. It is a dual density rubber outsole compound. The
10 black rubber is a stickier rubber than the gray compound. It
11 is a single density midsole material. It is a memalex
12 material, which is a EVA with a ten-percent rubber compound
13 in it, very specific to us. Uses a polyurethane
14 anti-penetration plate in the forefoot. It was designed by
15 La Sportiva, used exclusively in our product.

16 Q. In fact, Mr. Day, were you somehow involved in the
17 design of this particular product?

18 A. I wrote the original concept brief for the sole,
19 and did a lot of the preliminary cad work on the outsole
20 pattern. The concept brief is a document that says what we
21 want the shoe to do, and then the cad work is basically a
22 software program that allows with a cursor or a keyboard to
23 draw a pattern or a silhouette that we would like to use.

24 Q. The pattern or silhouette is the lug pattern on
25 the bottom?

1 A. Yes.

2 Q. Is that a very special type of lug pattern?

3 A. It wasn't very successful, so I guess it wasn't
4 very special. It is unique to La Sportiva, and we've used it
5 on three models during the outsole's history.

6 Q. What were the three models that it was used on?

7 A. Pike's Peak, the Ultranord and the Imogene.

8 Q. And, in fact, did you provide us with samples of
9 each of those; the Pike's Peak, the Ultranord and the
10 Imogene?

11 A. Yes.

12 Q. How long was the Pike's Peak shoe produced?

13 A. Its life cycle at retail was 2006 and 2007. We
14 are on a semi-annual selling cycle, so we sold it in 2005.
15 Initial shipments were in January of 2006 to retailers. It
16 probably went into production in Asia in September of '05,
17 and was delivered in our warehouse in December of '05.

18 Q. So it was sold, basically, for two years?

19 A. Yes, 2006 and 2007.

20 Q. And the Ultranord, does that share the same kind
21 of pattern on the bottom?

22 A. It does.

23 Q. Let me show you what has been marked for
24 demonstrative purposes as Exhibit 3262.

25 Do you recognize that particular shoe,

1 sir?

2 A. Yes, I do.

3 Q. What is that?

4 A. It is a production sample of a men's Ultranord in
5 the orange-gray color. It is marked a European size 42,
6 which is a men's size 9. It shares the same bottom package,
7 same technical aspects with the Pike's Peak. It is a
8 Gore-Tex construction shoe, so the upper construction is a
9 little different, and the metal wire is designed to take an
10 integrated gaiter that was sold with the product.

11 Q. When you say "integrated gaiter," what is an
12 integrated gaiter?

13 A. A gaiter is a fabric tube that is designed to
14 protect both the sock and the ankle from moisture, twigs,
15 sticks, et cetera, and integrated means that it attaches
16 specifically to this shoe to these three attachment points,
17 and it was exclusive to this product.

18 Q. Goes up your leg?

19 A. Yeah, just above the ankle.

20 Q. And what is significant about that particular
21 shoe, the Ultranord, as compared with the Pike's Peak?

22 A. How is it different?

23 Q. I would suggest how are they the same?

24 A. The bottom packages are identical. And what I am
25 referring to when I say "the bottom package" is the midsole,

1 which is the chassis or the support component, and then the
2 outsole. So everything from this line down is the same on
3 the two shoes, including the outsole pattern.

4 Q. And it has that same special sole on the bottom,
5 then?

6 A. It has the same special sole with the same
7 compounds, the same lug pattern, the same physical
8 silhouette.

9 Q. Those compounds, there is a special compound or
10 mixture, so to speak, for those soles that La Sportiva uses?

11 A. Yes.

12 Q. And what is the purpose of that?

13 A. We are a rock shoe and mountain climbing boot
14 company. One of the characteristics of an outsole that we
15 are looking for is stickiness, so it sticks to the material.
16 Specifically, this has an atypically high carbon compound in
17 the rubber material that gives it those characteristics of
18 stickiness.

19 Q. Sticks to whatever is underneath it?

20 A. It is designed primarily for rock. That is what
21 its heritage is, and that is what our background is.

22 Q. Is there another La Sportiva model that shares
23 that same, as you put it, bottom package?

24 A. There is. It is the Imogene.

25 Q. Let me show you what has been marked for

1 demonstrative purposes as Exhibit 3264.

2 And do you recognize what you have there
3 as Exhibit 3264?

4 A. Yes.

5 Q. What is that, sir?

6 A. It is a current production men's Imogene in a
7 43-and-a-half European size, U.S.A. ten-and-a-half size. It
8 is as you would find on my shelf right now as in stock.

9 Q. And does La Sportiva continue to make Ultranord
10 shoes?

11 A. No.

12 Q. What was the time frame that Ultranords were made
13 in by La Sportiva?

14 A. We sold it in 2007 and 2008.

15 Q. And then what about the Imogene? Does La Sportiva
16 continue to make Imogenes?

17 A. Imogene's production started in 2008, but will be
18 discontinued at the end of 2010. We are still selling it.
19 We are not building any more of them, because we are working
20 off the stock in the warehouse.

21 Q. So how many Pike's Peak -- how many pairs of
22 Pike's Peak shoes were made by La Sportiva?

23 A. 3800 pair.

24 Q. 3800 Pike's Peaks. And how many Ultranords were
25 made?

1 A. 1200.

2 Q. And then how many Imogenes have been made?

3 A. 3400.

4 A point of clarification. The numbers we
5 originally discussed were based on our original conversation,
6 which was 3100 pair. I've sold an additional 300 pair. I
7 checked before I came down to make sure it was as accurate as
8 I could be, so we have sold another 400 pair in the last 90
9 days.

10 Q. So going back to 2006 -- no. Let's go to 2008,
11 approximately July of 2008. How many pair of Pike's Peak had
12 been made as of July of 2008?

13 A. The entire 3800 pair.

14 Q. In terms of the Ultranord, how many pair of
15 Ultranord had been made as of July of 2008?

16 A. The entire 1200 pair.

17 Q. So that is 5000 bottom package of being the same;
18 right?

19 A. Uh-huh.

20 Q. Is that correct?

21 A. That's correct, yes.

22 Q. And then had you started manufacturing any
23 Ultranords as of that time frame of July of 2008 -- sorry,
24 not Ultranords. I withdraw that question. Thank you for
25 giving me that look, Mr. Day.

1 In regard to the Imogenes, had you
2 started making Imogenes in July of 2008?

3 A. Yes.

4 Q. Do you know how many you had made? And when I say
5 "you," I am talking about La Sportiva. How many Imogenes had
6 been made in approximately July of 2008?

7 A. July of 2008 we would have been working off the
8 first production run that would have been built in forth
9 quarter of 2007. Roughly 2500 pair. That would have been
10 our initial shipment of that product.

11 Q. So that bottom package, then, there were
12 approximately 7500 of those out on the market, so to speak?

13 A. Or in my warehouse.

14 Q. Or in your warehouse.

15 Do you know how many had been sold of
16 that bottom package as of July of 2008?

17 A. I do not.

18 Q. Were all of the Pike's Peaks gone at that point?

19 A. Yes.

20 Q. So all of that 3800 were sold?

21 A. Yes.

22 Q. And then do you know if all of the Ultrarords were
23 sold?

24 A. They were, all 1200 pair.

25 Q. So that is 1200?

1 A. Uh-huh.

2 Q. And then you were in the process of selling out
3 the Imogenes at that point?

4 A. The Imogene was an introduction for Spring of
5 2008. So the first time it would have been available to ship
6 to retailers would have been January of 2008.

7 Q. Let me show you what has been marked for
8 identification as Exhibit 682, 681, and 680. Okay. Let me
9 show you Exhibits 681, 2 and 680.

10 Showing you for the record first Exhibit
11 No. 681, do you recognize what is depicted in that particular
12 exhibit?

13 A. Yes.

14 Q. What is it?

15 A. They are 2-Ds of the Ultranord. The full 360
16 upper shots, one blank sheet of paper, and one shot of the
17 bottom package. And based on the fact that you can see on
18 the inside edge of the shoe the gaiter attachment, it is the
19 actual outsole that is on the Ultranord. So they are all a
20 series of 2-Ds of the Ultranord sample.

21 Q. 2-Ds, as in two dimensions?

22 A. Sorry. They are all photographs of the Ultranord.

23 MR. BUTNER: I would move for admission of 681
24 at this time.

25 MS. CHAPMAN: I object on grounds of relevance

1 and foundation. These are photographs of a demonstrative
2 exhibit.

3 THE COURT: Overruled. 681 is admitted.

4 BY MR. BUTNER:

5 Q. Let me show what you has been marked as Exhibit
6 No. 682. Take a look at Exhibit 682, please.

7 Do you recognize what is depicted in
8 Exhibit 682?

9 A. Yes. It is series of photographs of a men's
10 Imogene, a full rotation showing every aspect including the
11 outsole. So it is a photographic representation of the
12 Imogene.

13 MR. BUTNER: And I would move for the
14 admission of Exhibit 682 at this time.

15 THE COURT: Miss Chapman?

16 MS. CHAPMAN: Your Honor, a question on voir
17 dire.

18 THE COURT: Okay.

19 VOIR DIRE EXAMINATION

20 BY MS. CHAPMAN:

21 Q. Mr. Day, is that photograph that you are looking
22 at in that exhibit a picture of the shoe that is there in
23 front of you, that same Imogene shoe?

24 A. Since I didn't take the photographs, I can't say a
25 hundred percent, but it is a right sample or a right shoe

1 with the tag still attached, and that is how it is
2 represented in the photographs.

3 Q. You did not take the photograph?

4 A. I did not take the photographs.

5 MS. CHAPMAN: Same objection, Your Honor.
6 Foundation and relevance.

7 THE COURT: What aspect of foundation,
8 Miss Chapman?

9 MS. CHAPMAN: He didn't take the photograph.
10 He can't say what it is a photograph of, and again, it is a
11 photograph of a demonstrative exhibit of a shoe that is
12 apparently a sample shoe.

13 THE COURT: So, you are saying, though, it is
14 a photograph of the demonstrative exhibit?

15 MS. CHAPMAN: That is how it has been
16 represented to us, but we can't say it is a photograph of
17 that sample shoe.

18 THE COURT: So with regard to foundation, you
19 are concerned that there might be some variant of that shoe,
20 possibly?

21 Mr. Butner, if you would clear that up.

22 MR. BUTNER: I will, Judge.

23 DIRECT EXAMINATION RESUMED

24 BY MR. BUTNER:

25 Q. Is that an accurate depiction of the Imogene shoe

1 that was manufactured by La Sportiva back in 2000 -- actually
2 2008 through 2010; is that correct, sir?

3 A. It is current, correct, now. So it would have
4 been 2008 through today, through the end of the year.

5 Q. That is an accurate depiction of that particular
6 product?

7 A. The photographs are, yes.

8 MR. BUTNER: I would move for their admission
9 on that basis, Judge.

10 THE COURT: Ms. Chapman.

11 MS. CHAPMAN: I would continue to say that
12 since we have a demonstrative exhibit of the shoe and a
13 photograph of something, we don't know whether it is the same
14 shoe, I would continue to have a foundational objection and
15 also a relevance objection for a photograph of the
16 demonstrative exhibit.

17 THE COURT: Overruled. 682 is admitted.

18 BY MR. BUTNER:

19 Q. Then let me show you what has been marked for
20 identification purposes as Exhibit 680.

21 And if you would take a look at that,
22 please.

23 A. It's a series of photographs of men's Pike's Peak,
24 representing all aspects of it including the outsole. This
25 particular set of photographs in this sample share a unique

1 attribute in the fact that the sample of the Pike's Peak that
2 was provided by La Sportiva was an "R" and "D" sample, and
3 its "R" and "D" sample and its code number are white inked on
4 the bottom of the outsole. You can clearly see that in the
5 photograph.

6 Q. That bunch of photographs is actually a photograph
7 of the sample shoe that you have in your hand?

8 A. I can say that the photograph of the bottom, the
9 sole, is the same sole.

10 Q. You can't see the "R" and "D" number on the rest
11 of the shoe?

12 A. I cannot, and since I didn't take the photographs,
13 I can't say that.

14 Q. Is that an accurate depiction of the Pike's Peak
15 shoe in the photographs?

16 A. Yes.

17 MR. BUTNER: I would move for the admission of
18 Exhibit 680.

19 THE COURT: Ms. Chapman?

20 MS. CHAPMAN: Same objection, Your Honor.

21 THE COURT: Overruled. 680 is admitted.

22 BY MR. BUTNER:

23 Q. When you say "R" and "D" sample, do you mean
24 research and development sample?

25 A. Yes, sorry.

1 Q. That's okay.

2 Did La Sportiva do special research and
3 development in using these shoes?

4 A. As we define it, yes, because we are dealing with
5 remote factories in China, and we don't have the financial
6 resources to have someone on the ground through the entire
7 developmental cycle. As each aspect of the development is
8 created into a 3-D, a physical object, they send those
9 samples to us for confirmation and approval.

10 And this sample, the only one that La
11 Sportiva had in its possession at the time of the inquiry,
12 was the archive sample of the production, the final
13 confirmation sample is what we call it, where we say this is
14 exactly what we want you to build with all the technical
15 characteristics, and we sign off and we archive that.

16 Q. That, in essence, is the final model that was
17 presented to you from whomever was making the shoe for La
18 Sportiva?

19 A. Yes.

20 Q. And you approved it, and that is what went into
21 production?

22 A. Yes.

23 Q. And does this have the same kind of proprietary
24 sole on the bottom as the other two models?

25 A. Yes.

1 Q. And does La Sportiva protect its proprietary
2 soles?

3 A. Yes. We register with the Trademark Office. We
4 actually pursue any infringements on our proprietorial
5 technology, although in this category, running product, to
6 date we have not had an issue with it. It is only
7 mountaineering shoes and rock shoes where we have had to
8 pursue that.

9 Q. You've never had a problem to the knowledge of
10 La Sportiva with somebody using your bottom package on their
11 shoes?

12 A. Generally counterfeiters pick a successful product
13 to counterfeit.

14 Q. I gather from what you are saying, these shoes
15 weren't all that successful?

16 A. The unit counts that we are talking about are
17 insignificant in the footwear world. A success is a product
18 that sells 10,000 units in a year.

19 Q. And these units didn't even sell 10,000 total;
20 right?

21 A. In their life span, no.

22 Q. Let me show you what's been marked as Exhibit
23 No. 3240 for identification purposes.

24 Do you recognize what is depicted in
25 Exhibit 3240?

1 A. Yes.

2 Q. What is that, sir?

3 A. It is a La Sportiva packing list.

4 Q. And are you the records custodian for that
5 particular document also?

6 A. Yes.

7 Q. And what is it a packing list for? Without
8 testifying about what the exhibit says, what it is used for?

9 A. It is the documentation that is created by the
10 warehouse to be included in a shipment to reflect what is in
11 the box.

12 Q. So does it go with the shoes?

13 A. Yes.

14 Q. When they are shipped out?

15 A. Yes. It is a duplicate form. The carbon goes in
16 with the shipment, or the second copy goes in with the
17 shipment. It is technically a carbonless copy. And then the
18 top document goes into our files.

19 Q. Does that particular packing list, is that
20 associated with the transaction for Mr. DeMocker on April 26
21 of the year 2006?

22 A. Yes. The date on this is 4/25/06.

23 MR. BUTNER: I would move for the admission of
24 Exhibit 3240 at this time.

25 THE COURT: Ms. Chapman?

1 MS. CHAPMAN: No objection, with the
2 understanding previously discussed.

3 THE COURT: It also has writing?

4 MR. BUTNER: It has writing on the back,
5 Judge, and we will get that taken care of.

6 THE COURT: 3240 is admitted, just the front
7 page there.

8 BY MR. BUTNER:

9 Q. Let's put that up on the overhead at this point.

10 Okay. Now tell us what this particular
11 record indicates, please.

12 A. It indicates that on 4/25/06 a shipment was picked
13 and boxed with one pair of Rajas, one pair of Pike's Peak,
14 both size 43-and-a-half. It was shipped UPS ground
15 commercial. Account number in the left-hand corner, and
16 "sold to" was a pro account, Outdoor ProLink, and the
17 "shipped to" was Steven DeMocker at Plaza West Drive in
18 Prescott.

19 Q. So this shows what was shipped to Mr. DeMocker by
20 La Sportiva?

21 A. Yes.

22 Q. And if I understand your testimony correctly then,
23 you had received an order before from whom, before shipping
24 this?

25 A. The order was received from Outdoor ProLink.

1 Q. And the order from Outdoor ProLink then was a
2 request to ship shoes to whom?

3 A. Steven DeMocker.

4 Q. So he is the ultimate customer in this case?

5 A. He is the ultimate recipient of the shipment.

6 Q. And then looking at that particular document, this
7 doesn't have any price on the bottom; right?

8 A. There is no pricing included.

9 Q. Is there some reason why there is no pricing
10 included on this particular document?

11 A. All of the packing lists -- that is a protocol or
12 procedure that we follow. It originated from when we were
13 shipping product to retailers, and the retailers did not want
14 the store staff or the shipping and receiving staff to know
15 what the actual cost of goods was, because it impacted their
16 internal procedures, and just to keep things simple, it is
17 universal. No packing list reflects the cost of goods when
18 it goes into the package.

19 Q. Let me show you what has been marked as Exhibit
20 No. 3241 for identification purposes, please.

21 Showing you Exhibit 3241, do you
22 recognize that particular document?

23 A. Yes.

24 Q. What is it?

25 A. It is an invoice that was generated for this

1 transaction, dated 4/26, the day after it was shipped, with
2 the "ship to" Steven DeMocker, and a bill to Outdoor ProLink
3 at their address in Boulder. And it also has the manual
4 stamp that reflects the fact that the invoice was paid on
5 May 10th of 2006 by Outdoor ProLink.

6 Q. So, is this the final document in the transaction
7 process with La Sportiva?

8 A. Once it is marked paid, yes, then it goes into the
9 dead file.

10 Q. And you, again, are the records custodian for
11 those records?

12 A. I am.

13 MR. BUTNER: I would move for the admission of
14 3241 at this time.

15 THE COURT: Miss Chapman.

16 MS. CHAPMAN: No objection with the same
17 understanding, Your Honor.

18 THE COURT: 3241 is admitted with the omission
19 of any additional writing.

20 MR. BUTNER: I am going to put that on the
21 overhead, too. Thank you.

22 Let's back this up just a little bit. I
23 will see if I can focus it. Okay.

24 Q. So you bill to Pro Outdoor ProLink; right?

25 A. We bill to Outdoor ProLink. That prefix is an

1 internal accounting designation, so we bill to Outdoor
2 ProLink.

3 Q. Sorry, you are right. I remember now. That is
4 the category in which Outdoor ProLink falls as a customer; is
5 that correct?

6 A. Yes, sir.

7 Q. So, you bill to Outdoor ProLink for these two pair
8 of shoes; right?

9 A. Yes.

10 Q. It indicates that you shipped to Mr. DeMocker at
11 UBS, 1560 Plaza West Drive; right?

12 A. Yes.

13 Q. And then the total cost of the transaction as
14 billed to Outdoor ProLink, can you read that?

15 A. 94 -- no, actually I cannot.

16 Q. Let me show you -- I will just hand you the
17 document.

18 A. Subtotal on the product was \$94.13. There was no
19 additional discount. Freight charges were \$6.78, for a total
20 of \$100.91.

21 Q. And then you received payment, according to this,
22 on May 10 of 2006; right?

23 A. That's correct.

24 Q. And who paid you?

25 A. Outdoor ProLink.

1 Q. Presumably they got payment from their customer;
2 right?

3 A. Yes.

4 Q. And then let me show you what is already admitted
5 into evidence as Exhibit 3238.

6 I would ask if you recognize that
7 particular document.

8 A. Yes. It is a printout of an e-mail that we
9 received from Outdoor ProLink placing the order. So this is
10 the first document in the document thread, so to speak. So
11 we received this on 4/25/06 as an e-mail addressed to
12 customer service at La Sportiva. Whatever customer service
13 representative was rotated printed the document to start the
14 process, and then did the data entry to create the pick
15 ticket, the picking list off of this.

16 Q. So that is the placement of the order?

17 A. From Outdoor ProLink to us.

18 Q. Is it actually -- is it a document that was sent
19 to La Sportiva by Outdoor ProLink?

20 A. Yes.

21 Q. And you recognize it being sent to you?

22 A. Yes.

23 Q. We have heard some testimony in this case that
24 this was a confirmation received by Outdoor ProLink. Does
25 that make any sense to you?

1 A. I understand what they mean by a confirmation, but
2 the -- based on the format of the document with Gareth and
3 Outdoor ProLink's electronic signature on the bottom
4 left-hand corner, I assume that it is the original document
5 from Outdoor ProLink to us to place the order.

6 Q. And did you keep this particular record in your
7 files as part of your ordinary course of business in this
8 particular transaction?

9 A. As a paper copy, no, we did not. It was stored
10 electronically as an e-mail in ProLink's file, but the first
11 paper document that we would have generated would have been
12 the pick ticket, the picking list.

13 Q. This indicates, of course, the purchase of the two
14 pair of shoes; right?

15 A. Yes.

16 Q. What does Raja No. 304 mean?

17 A. That is the stock number.

18 Q. And then, obviously, Pike's Peak No. 364, that is
19 also a stock number?

20 A. Yes.

21 Q. Let me show you what has been marked as Exhibit
22 3265. If you would take a look at what is in that box.

23 Do you recognize what is in the box 3265?

24 A. Yes.

25 Q. What is it?

1 A. It is men's Raja, European size 43-and-a-half,
2 men's ten-and-a-half, yellow cut away. It is a different but
3 still proprietorial La Sportiva outsole, different rubber
4 compound, different construction, different style, but it is
5 a used men's Raja.

6 Q. And looking at Exhibit 3238 up on the overhead
7 here, is this the type of men's Raja that is described by
8 that particular entry right there? La Sportiva Rajas
9 No. 304, gray-gold, 43-and-a-half?

10 A. Yes.

11 Q. Same type; is that correct?

12 A. Yes.

13 Q. You can't tell for certain it is the same shoe or
14 not?

15 A. No, I cannot.

16 Q. Were the Rajas a popular shoe?

17 A. No.

18 Q. Okay. You didn't make a lot of Rajas, either,
19 then?

20 A. Roughly, we are looking at a couple of production
21 runs of 2500 units, each split between the two different
22 colors that were available.

23 Q. So about 5,000 total but two different colors?

24 A. Yes.

25 Q. But this is the color that is depicted in that

1 particular order up there on the overhead; is that correct?

2 A. That's correct.

3 Q. In regard to this particular transaction, the one
4 involving Mr. DeMocker, do you follow-up concerning these
5 types of transactions to see if the customer receives the
6 goods or not?

7 A. No, we do not.

8 Q. Did you receive any complaints that Mr. DeMocker
9 did not receive his two pair of shoes as ordered?

10 A. We did not.

11 Q. Who would you have expected to receive a complaint
12 from if he had not?

13 A. Outdoor ProLink.

14 Q. They would have contacted you?

15 A. Yes.

16 Q. Have they ever done that on any other orders, not
17 necessarily, of course, to Mr. DeMocker, but any other orders
18 where the customer didn't receive the shipment of whatever
19 was ordered?

20 A. Actually, I can't think of an occasion, so I can't
21 think that they have.

22 Q. You can't think of a single time when the customer
23 didn't receive the order?

24 A. Not via Outdoor ProLink, no.

25 Q. In fact, Mr. Richards in Outdoor ProLink, they

1 paid you in full for the order on or about May 10th; is that
2 correct?

3 A. That's correct.

4 Q. You would expect, wouldn't you, that they wouldn't
5 pay if the customer hadn't received the goods?

6 A. I wouldn't.

7 Q. You wouldn't pay, is that what you meant?

8 A. I wouldn't pay.

9 Q. So just to back up for a moment, then, at this
10 point in time, the total production on the bottom package, as
11 you described it, for the Ultranord and the Imogene and the
12 Pike's Peak was a total number of, I think you said, 3800 and
13 1200 and then?

14 A. 3400. We are about 8600 units.

15 Q. 8600 units. Okay.

16 MR. BUTNER: I would move for the admission of
17 Exhibit 3265 at this point in time. That would be that box
18 with those shoes right there, Judge, for demonstrative
19 purposes in terms of the Rajas at this point.

20 MS. CHAPMAN: No objection.

21 THE COURT: Okay. 3265 is admitted for
22 demonstrative purposes.

23 MR. BUTNER: And I placed these photographs
24 into evidence, because it is my understanding that the
25 clerk's office doesn't take the shoes, those kinds of objects

1 anymore; is that right?

2 THE COURT: That has been a process for
3 sometime, yes.

4 MR. BUTNER: Okay.

5 I don't have any further questions of
6 this witness at this time.

7 THE COURT: Thank you.

8 Miss Chapman, we will have to break in
9 about ten minutes.

10 MR. BUTNER: One further thing, Judge. I
11 would move for the admission of the other shoes, Exhibits
12 3264, 3263, and 3262 for demonstrative purposes in order that
13 they can be shown to the jury, but of course, as the Court
14 informed me, they won't go with the record beyond that.

15 THE COURT: Ms. Chapman, as to those
16 demonstrative exhibits?

17 MS. CHAPMAN: No objection.

18 THE COURT: That is 3262, 63, 64. They are
19 admitted for that purpose.

20 Ms. Chapman, do you want to start?

21 MS. CHAPMAN: Your Honor, I am happy to take a
22 break now. I think I have about ten minutes. If you want to
23 get through this witness, I can do that.

24 THE COURT: We do have to stop at ten till,
25 then. Thank you.

CROSS-EXAMINATION

BY MS. CHAPMAN:

Q. Good morning, Mr. Day.

A. Good morning.

Q. As I understand it, these soles are made in China for La Sportiva; is that correct?

A. That's correct.

Q. After you do the design process that you explained, you contract with the company in China, who actually manufacturers the sole; is that correct?

A. The first contractual arrangement is with the company that produces what we refer to as a "tech package," which is all the tooling and equipment necessary to turn the raw materials into a finished product. That is the actual proprietorial object that is owned by La Sportiva, that tech package. Once that tech package is completed, prototypes are built for the final samples, then a contract is signed with the factory, who then takes that tech product and then builds the product on the production floor.

Q. So, the factory is in China that builds this product?

A. Yes.

Q. That is where the product is manufactured?

A. That's correct.

Q. Does that company manufacturer soles for other

1 shoe companies, as well?

2 A. The footwear factories in China are all inclusive.
3 They do every aspect of the manufacturing, from pouring the
4 midsoles to sewing of the uppers to the lacing of the final
5 product.

6 Q. So the company that La Sportiva works with in
7 China also makes shoes -- manufactures shoes for other shoe
8 companies; is that correct?

9 A. Absolutely.

10 Q. There is a tread design that is the same on the
11 three models of La Sportiva shoes for which you have
12 demonstrative exhibits up there; is that right?

13 A. Yes.

14 Q. That is the Pike's Peak, the Ultrarond and the
15 Imogene?

16 A. Yes.

17 Q. I think what I just heard you say is that there
18 are about 8600 of those shoes in production, either sold or
19 waiting to sold with that same tread pattern on the bottom;
20 is that right?

21 A. Yes.

22 Q. There may be other shoes by other manufacturers
23 that have similar tread patterns, but La Sportiva shoes,
24 those are the only three that have that tread pattern; is
25 that correct?

1 A. That's correct.

2 Q. I think you described it as a trail running shoe?

3 A. Yes.

4 Q. Is that how you described it?

5 A. That is how we viewed it. The industry didn't.

6 That was part of the problem.

7 Q. We heard it described in a couple of different
8 ways. One was as an approach shoe?

9 A. From my perspective and the brand's perspective,
10 that would have been a miscategorization. An approach shoe
11 implies a product that is designed to be used-- the approach
12 aspect of it is walking in to do a technical rock climb, and
13 the idea is to be able to use the same shoe, both for the
14 horizontal approach and then the vertical aspect of the
15 climb. The outsole patterns on that type of sole are
16 designed for maximum friction versus traction, so the lug
17 pattern is minimal, the lugs are very shallow, and there is a
18 lot of raw material on it.

19 This particular pattern has a very
20 aggressive outsole pattern. The lug pattern is designed
21 primarily for traction versus friction.

22 Q. So, those three shoes, the Imogene, the Pike's
23 Peak and the Ultrarord, you would describe them as more of a
24 trail running shoe than an approach shoe?

25 A. Yes.

1 Q. Those three shoes are similar shoes, in that they
2 are all three trail running shoes as would you describe them?

3 A. Yes.

4 Q. And they are not designed or built to use with
5 clipless mountain bike pedals; are they, either of those
6 three shoes?

7 A. They are not a speedy compatible.

8 Q. I was also wondering, you had talked about you had
9 different sizes available in men's shoes and women's shoes.
10 Is there any difference in the tread pattern between the sole
11 on the men's shoe and the sole on the women's shoe for those
12 three models?

13 A. No. The molds that they are poured in would be
14 the same.

15 Q. For both the men's shoes and the women's shoes?

16 A. Yes.

17 Q. And after those shoes were shipped from La
18 Sportiva in April of 2006, you have no idea what happened to
19 those shoes after that; is that correct?

20 A. That is correct.

21 MS. CHAPMAN: No further questions, Your
22 Honor.

23 THE COURT: Thank you.

24 We will go ahead and take the morning
25 recess, then. So, ladies and gentlemen, please be back in

1 the jury room in 15 minutes or right about 11:00. Remember
2 the admonition.

3 And, Mr. Day, the rule of exclusion of
4 witnesses has been invoked in this case, but at this time I
5 only need to tell you that you cannot talk to other witnesses
6 at this point, okay?

7 THE WITNESS: Yes, sir.

8 THE COURT: You will be excused, as well.

9 We will resume in about 15 or 20 minutes.

10 MR. SEARS: Your Honor, can we have a moment
11 after the jury leaves?

12 THE COURT: I will excuse the jury, and the
13 witness, you may step down as well. Please watch your step
14 there, and I will ask that the parties remain for a few
15 minutes.

16 (Whereupon, the jury exits the courtroom.)

17 (Brief recess.)

18 (Whereupon, a discussion was held in
19 open court out of the presence of the jury
20 but is not contained herein.)

21 (Whereupon, the jury enters the courtroom.)

22 THE COURT: The record will show the presence
23 of the defendant, counsel, and the jury. The witness has
24 returned to the stand.

25 Ladies and gentlemen, and there is a very

1 logical question here, the jury wants an explanation of what
2 "demonstrative purposes" mean.

3 And that is just to indicate that it is
4 only going to be used here in court, the exhibit is only
5 going to be used here in court to demonstrate something to
6 you. It is not going to be part of the permanent record of
7 the case, such as a photograph or a document that will be
8 admitted, as well.

9 I also want to mention if the jury, when
10 they were entering, heard me express any kind of a statement,
11 it is only that I was concerned that we were starting at this
12 point, and I wanted to make sure we could get this witness in
13 and get his testimony completed before the break, and it was
14 only about trial timing, not any kind of a comment. I don't
15 know if anybody happened to hear me say that as they went by
16 chambers.

17 I am hoping we can proceed with Mr. Day's
18 testimony and complete that before the lunch hour.

19 MR. BUTNER: I am hoping so too, Judge.

20 THE COURT: Mr. Day is on the stand. He has
21 been sworn. Thank you.

22 REDIRECT EXAMINATION

23 BY MR. BUTNER:

24 Q. Okay. Mr. Day, you were talking about the
25 proprietary nature of the sole on these shoes for La

1 Sportiva; correct?

2 A. Yes.

3 Q. And, of course, you explained to us that that
4 means that it belongs to La Sportiva, and in fact, you even
5 indicated it was trademarked, if I understood you?

6 A. Yes.

7 Q. Now, I am showing you the Pike's Peak shoe, and it
8 has something that you were talking about. You said these
9 shoes were designed for max friction?

10 MS. CHAPMAN: Your Honor, this is outside the
11 scope of cross-examination.

12 THE COURT: I will allow some recross on this
13 point, if you wish.

14 You may continue.

15 MR. BUTNER: Judge, it isn't outside. There
16 is a question that was exactly about this point, max
17 friction.

18 THE COURT: I am going to permit the question,
19 Mr. Butner.

20 MR. BUTNER: Thank you.

21 Q. You were testifying about max friction. Do you
22 recall that, Mr. Day?

23 A. Yes.

24 Q. I am showing you the sole on the Pike's Peak
25 model. There is a thing right in the middle there that

1 indicates something about friction. What is that?

2 A. Well, there is a trademark. The word "Frixion"
3 with an -- spelled with an "X." F-R-I-X-I-O-N, that is a
4 registered, proprietary trademark of La Sportiva referring to
5 the rubber compound. That Frixion trademark is color
6 categorized. This is a blue Frixion outsole. We use
7 currently four different formulas of Frixion rubber ranging
8 from running shoes to climbing shoes, and Frixion is an
9 exclusive brand of a rubber compound that La Sportiva uses.

10 Q. And this Max Frixion compound, if you will, is
11 that to get the best kind of grip for the bottom of the sole?

12 A. Yes.

13 Q. Similarly, you indicated that it had an aggressive
14 outsole?

15 A. Yes.

16 Q. What is aggressive outsole on that shoe?

17 A. A lug pattern that is relatively deep, the
18 vertical height of each lug, the aggressiveness that is
19 reflected in how widely spaced the lugs are so that it gets
20 maximum friction so there is a lot of penetration into the
21 surface that you are walking or running on.

22 Q. Is that in order to allow the shoe to be able to
23 grip to the maximum smaller objects beneath the shoe?

24 A. Technically, no. Frixion, the traction, the
25 aspect of an outsole that is reflected in the pattern of the

1 lugs is to provide traction in unstable or slippery materials
2 like dirt, clay, snow, things like that. The ability to
3 grip, to stick to a surface is a function of the Frixion,
4 which is a function of the compound that the soles is made
5 out of.

6 Q. Okay. So then the lugs and so forth are for the
7 kind of surface that the person is either walking or running
8 on?

9 A. Yes.

10 Q. But the compound, the Frixion compound that is
11 proprietary to La Sportiva, that is what allows it to grip
12 the object, so to speak, beneath the sole?

13 A. The material, the surface.

14 Q. Whatever material is beneath the sole?

15 A. Right. Rock, concrete, whatever.

16 Q. So these kinds of shoes can be used to climb in to
17 some extent?

18 A. Yes.

19 Q. And grip smaller objects with the Frixion
20 compound?

21 A. Yes.

22 MR. BUTNER: No further questions. Thank you,
23 sir.

24 THE COURT: Thank you, Mr. Butner.

25 Ms. Chapman.

1 MS. CHAPMAN: One quick follow-up.

2 RECROSS-EXAMINATION

3 BY MS. CHAPMAN:

4 Q. The trademark that you were just talking about
5 with respect to the Max Frixion, that's for the rubber
6 compound that the sole is made of; is that correct?

7 A. Yes.

8 Q. That's where the proprietary trademark is, for the
9 material?

10 A. There are a body of proprietorial trademarks. The
11 Frixion refers to the compound material that it is made out
12 of. The Ultra Trail, which is the term, the name of the
13 outsole is another registered trademark of La Sportiva that
14 reflects the pattern of the outsole, not the material.

15 Q. There is two trademarks, then, one for the
16 material and one for the design?

17 A. Yes.

18 MS. CHAPMAN: Thank you.

19 THE COURT: Mr. Butner.

20 MR. BUTNER: Nothing further, Judge. Thank
21 you very much.

22 THE COURT: Ladies and gentlemen, are there
23 any questions for this witness? There appears to be some.

24 Mr. Day, if you please remain seated
25 while I get the jury questions. I do have to discuss the

1 questions with the attorneys. We will try to do that here at
2 side bar, and then I will come back.

3 (Whereupon, a discussion was held at side bar.)

4 QUESTIONS BY THE JURY

5 THE COURT: Mr. Day, I ask the questions
6 first, and then the lawyers may choose to follow-up.

7 The first question is: To clarify, is
8 the tread pattern on the Pike's Peak, Ultranord and Imogene
9 shoe proprietary to La Sportiva?

10 THE WITNESS: Yes.

11 THE COURT: Any follow-up on that?

12 MR. BUTNER: No.

13 THE COURT: Ms. Chapman?

14 MS. CHAPMAN: No.

15 THE COURT: And then the second question on
16 this page, three altogether. Are La Sportiva shoes
17 distributed -- are La Sportiva distributed slash sold all
18 over the world?

19 THE WITNESS: Yes.

20 THE COURT: Do you know how many pairs of
21 Pike's Peak Ultranord or Imogene pairs were sold outside of
22 the United States?

23 THE WITNESS: The numbers that I gave include
24 all of our distribution territory, which is Mexico, the
25 United States and North America. Those products were

1 exclusive to those markets. They weren't available in any
2 other markets. They were not available for sale in Central
3 or South America, or former Eastern Block or Europe.

4 THE COURT: Follow-up to those question,
5 Mr. Butner?

6 FOLLOW-UP QUESTIONS

7 BY MR. BUTNER:

8 Q. What was the total number of that bottom package
9 that was common to all of those three shoes in terms of the
10 number of shoes sold by La Sportiva?

11 A. In men's, 3800 pair.

12 Q. That was for the Pike's Peak?

13 A. Yes.

14 Q. And for the Ultranord?

15 A. It was 1200.

16 Q. And then how many for the Imogene?

17 A. 3400.

18 Q. So that's the total number of shoes that had that
19 bottom package, that sole pattern that was sold by La
20 Sportiva?

21 A. Yes.

22 MR. BUTNER: Thank you.

23 THE COURT: Thank you, Mr. Butner.

24 Miss Chapman.

25 MS. CHAPMAN: Thank you.

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FOLLOW-UP QUESTIONS

BY MS. CHAPMAN:

Q. What are the numbers for the total numbers of women's shoes that were sold with that bottom package?

A. I cannot answer that question. I don't have that information.

Q. So, there is no difference between the tread patterns for the women's shoes and the men's shoes for those three particular models; is that correct?

A. That's correct.

Q. The 8600 is total number of men's shoes sold?

A. Yes.

Q. There is also an additional unknown number of shoes sold with that bottom package that has no distinction in terms of the bottom package?

A. Yes.

Q. And you can't provide that number?

A. Not at this time.

Q. Those shoes were sold on-line?

A. Yes.

Q. And they were also sold in retail stores?

A. Yes.

Q. Were they sold in retail stores in this area of Prescott, as well?

A. Yes.

1 MS. CHAPMAN: Thank you.

2 THE COURT: Anything else?

3 MR. BUTNER: Yes.

4 FOLLOW-UP QUESTIONS

5 BY MR. BUTNER:

6 Q. Were there more men's shoes or less men's shoes
7 sold than women's? Do you know that?

8 A. We generally sell a ratio of two-and-a-half to
9 three to one. Two-and-a-half to three pair of men's to one
10 pair of women's.

11 Q. But in this particular case, you just don't know
12 the exact number of women's?

13 A. No one asked me to prepare that information, and I
14 didn't pull the files.

15 MR. BUTNER: Thank you.

16 QUESTIONS BY THE JURY

17 THE COURT: This question starts with a bit of
18 introduction.

19 You said Steve being recipient of this
20 shoe order, could Steve have used these shoes as a gift to
21 anyone or given a pair to a friend or family member?

22 THE WITNESS: I can't speak to that.

23 THE COURT: Okay. Then next question: Do
24 your sticky compounds wear extremely fast, like a sticky
25 racing tire's compound?

1 THE WITNESS: Yes.

2 THE COURT: Follow-up to either of those,
3 Mr. Butner? Actually, to the last question.

4 FOLLOW-UP QUESTIONS

5 BY MR. BUTNER:

6 Q. In regard to the last question, you have right in
7 front of you the Rajas shoe. Does that have a similar type
8 of compound sole on it as the Pike's Peak model?

9 A. The compound on the Raja is a slightly stickier
10 compound. It is Frixion Red, and the fact that it is a
11 little stickier, it will wear faster.

12 Q. So the Raja would wear faster than the Pike's Peak
13 model?

14 A. Or any of the models that share this outsole.

15 MR. BUTNER: Thank you, very much.

16 THE COURT: Ms. Chapman.

17 FOLLOW-UP QUESTIONS

18 BY MS. CHAPMAN:

19 Q. By "wear faster," what do you mean?

20 A. The lugs will reduce in size, and the sole will
21 eventually go smooth in regards to the outsole.

22 Q. That happens as a result of wear?

23 A. Yes.

24 Q. So if the shoes aren't worn over time, it doesn't
25 happen just because of the compound itself?

1 A. The outsole does not deteriorate just because of
2 age. So there would be no physical change in the outsole
3 just from sitting in the closet.

4 MS. CHAPMAN: Thank you. No further
5 questions.

6 THE COURT: Then, counsel, may Mr. Day be
7 excused as a witness?

8 MR. BUTNER: He may, Judge.

9 MS. CHAPMAN: Yes, Your Honor.

10 THE COURT: Sir, you will be excused as a
11 witness at this time, and I indicated I would give you a
12 little more instruction on the rule of exclusion of witnesses
13 which applies in this case. This means that you cannot
14 communicate in any way with other witnesses about your
15 testimony or about any other aspect of this case until all
16 witnesses have testified. It is best that you not discuss
17 this case with anyone until the trial is completed.

18 However, you may talk to the attorneys
19 about the case as long as no other witnesses are present.

20 Do you understand?

21 THE WITNESS: I do.

22 THE COURT: Thank you. Please watch your
23 step. You are excused at this time.

24 Ladies and gentlemen, we will proceed
25 then with the noon recess. Please remember the admonition,

1 all aspects.

2 And I think there may be one legal matter
3 to discuss, so please return at 1:15, and be assembled at
4 1:15. We will start as soon as we can.

5 Thank you.

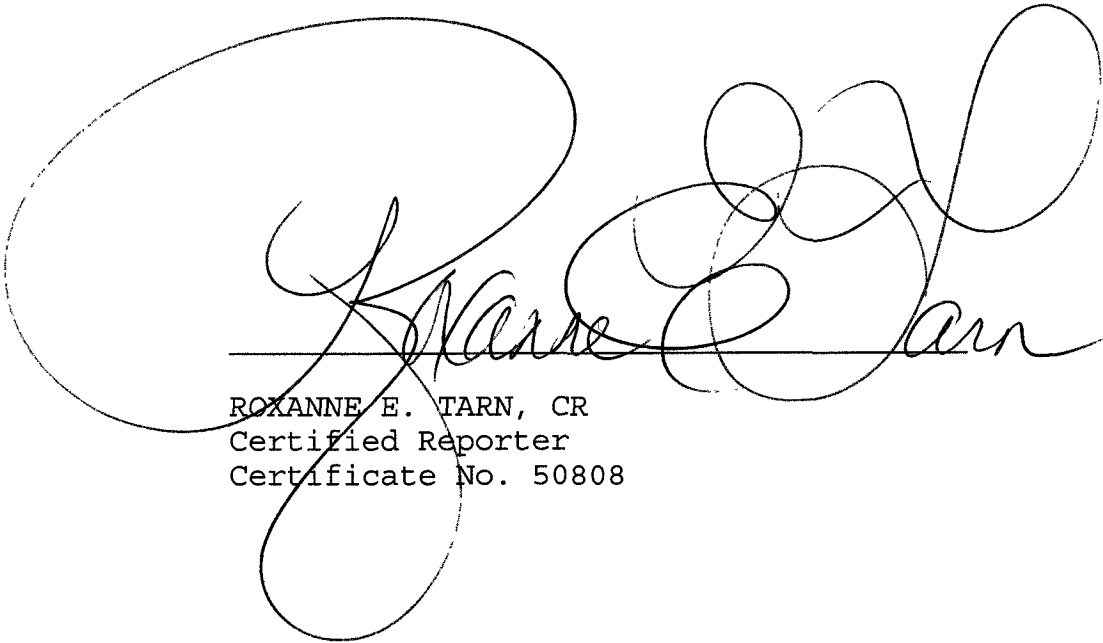
6 (Whereupon, a recess was taken at 11:51 a.m.

7 to resume at 1:15 p.m. of the same day.)
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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 78 constitute a full, true, and accurate transcript
of the proceedings had in the foregoing matter, all done to
the best of my skill and ability.

SIGNED and dated this 3rd day of October,
2011.



ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808